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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

**THE CALIFORNIA NATURAL
RESOURCES AGENCY, ET AL.,**

Plaintiffs,

v.

WILBUR ROSS, ET AL.,

Defendants.

Case No. 1:20-cv-00426-DAD-SKO

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

Date: May 19, 2020
Time: 9:00 a.m.
Dept: 5
Judge: Hon. Dale A. Drozd
Trial Date: TBD
Action Filed: February 20, 2020

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---	---

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84 Fed. Reg. 54,733 (Oct. 10, 2019)	3
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INTRODUCTION

On February 19, 2020, the U.S. Bureau of Reclamation issued a Record of Decision adopting biological opinions issued in 2019 and began operating the Central Valley Project under those opinions. As Reclamation's operations in the first ten days of this month demonstrate, this Record of Decision allowed Reclamation to vastly expand its pumping in the Central Valley, and it intends to do the same next month when the Record of Decision again exercises primary control over its operations. This increased pumping will trap and kill already endangered species at a crucial time in their life cycles and threaten habitat critical to their survival. To prevent this harm, California is filing an amended complaint to add its now-ripe claim under the Endangered Species Act (ESA) as well as a parallel claim under the California Endangered Species Act (CESA) and seeks a preliminary injunction.

Reclamation's increased pumping operations are unlawful under both the ESA and CESA. As has already been shown in related litigation, the Decision violates the ESA because the biological opinions underlying it fail to provide sufficient protections for fish species listed under federal law. Reclamation's operations also violate CESA because, despite clear Congressional direction to comply with state laws related to water use and with CESA in particular, Reclamation has neither sought nor obtained the required incidental take permit from the California Department of Fish and Wildlife (CDFW). Consequently, Reclamation has been violating CESA continually as its operations kill and otherwise "take" fish listed under CESA—violations that are mounting as Reclamation kills and injures more fish. In addition, Reclamation violated the National Environmental Policy Act (NEPA) because it failed to take the required hard look at the environmental impacts of its proposed operations or to supplement its draft or final environmental impact statement.

Reclamation's unlawful operations threaten to irreparably harm species that already are on the brink of extinction. Although fish such as the Delta smelt, the longfin smelt, the Central Valley steelhead, and the winter-run and spring-run Chinook salmon have long been listed as endangered or threatened under either the ESA or CESA or both, in the last decade their numbers have dropped precipitously, some to levels so low that they can hardly be found. Reclamation's

increased pumping operations will “entrain,” or trap, many of these already endangered fish at a crucial point in their life cycle and damage or shrink critical habitat. These actions threaten to push one protected species, the Delta smelt, substantially closer to extinction and to increase the already disturbingly high entrainment and death of the endangered longfin smelt and to kill a significant proportion of a unique population of threatened steelhead trout. These are imminent and irreparable harms. Both the balance of equities and the public interest strongly favor a preliminary injunction returning Reclamation to its operations before the unlawful Record of Decision in order to save these species.

Therefore, Plaintiffs California Natural Resources Agency, California Environmental Protection Agency, and People of the State of California by and through California Attorney General Xavier Becerra (collectively, California) hereby move the Court for a preliminary injunction prohibiting Reclamation from operating under its February 19, 2020, Record of Decision adopting the 2019 biological opinions and ordering it to operate to the requirements in Reasonable and Prudent Alternative Action IV.2.1 of the previously applicable 2009 biological opinion from May 11 through May 31, 2020.¹

FACTUAL AND LEGAL BACKGROUND

I. COORDINATED OPERATIONS OF THE FEDERAL AND STATE WATER PROJECTS

Together, the Central Valley Project (CVP) and the State Water Project (SWP) constitute one of the world’s largest water storage and conveyance systems. Request for Judicial Notice in Support of Plaintiffs’ Motion for Preliminary Injunction (RJN) Ex. 1 at 144. Reclamation operates the CVP, which consists of 20 dams and reservoirs that deliver water to 29 of California’s 58 counties. *Id.* at 2. The California Department of Water Resources (DWR) operates the SWP to deliver water to its contractors. *Id.* Since 1986, Reclamation and DWR

¹Plaintiffs in related case *PCFFA v. Ross*, No. 1:30-cv-00431 (E.D. Cal.), have filed a motion for preliminary injunction seeking to enjoin Defendants from operating under the 2019 Biological Opinions until that matter can be heard on the merits. California’s motion and more limited request for relief is intended to supplement, rather than replace, the plaintiffs’ motion in that case. California understands that its motion may be moot if the Court grants the *PCFFA* plaintiffs’ motion and enjoins the 2019 Biological Opinions through trial of that matter.

1 have coordinated the operations of the CVP and SWP. *Id.* at 4; *see also* Pub. L. No. 99-546, 100
 2 Stat. 3050 (1986).

3 **II. THREATENED AND ENDANGERED SPECIES AFFECTED BY CENTRAL VALLEY**
 4 **PROJECT OPERATIONS**

5 The CVP exports water from “an important habitat for thousands of river and anadromous
 6 fish, many of which are endangered.” *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d
 7 971, 980–81 (9th Cir. 2014). CVP operations affect several fish species listed as threatened and
 8 endangered under the ESA as well as CESA. The Delta smelt (*Hypomesus transpacificus*) and
 9 the Central Valley winter-run and spring-run Chinook salmon (*Oncorhynchus tshawytscha*) are
 10 listed under both statutes. *Id.* at 986 (winter-run and spring-run Chinook salmon ESA); Cal. Code
 11 Regs. tit. 14, § 670.5(a)(2)(M) (winter-run Chinook salmon CESA); Cal. Code Regs. tit. 14, §
 12 670.5(b)(2)(C) (spring-run Chinook salmon CESA); *San Luis & Delta Mendota Water Auth. v.*
 13 *Jewell*, 747 F.3d 581, 592 (Delta smelt ESA); Cal. Code Regs. tit. 14, § 670.5(a)(2)(O) (Delta
 14 smelt CESA). The Central Valley steelhead (*Oncorhynchus mykiss irideus*) is listed only under
 15 the federal ESA, and the longfin smelt is listed under CESA but not yet under the ESA.² *Locke*,
 16 776 F.3d at 986 (steelhead); Cal. Code Regs. tit. 14, § 670.5(b)(2)(E) (longfin smelt).

17 Many of these species have suffered severe declines. As documented in the following
 18 chart, there are almost no Delta Smelt left:

19 //

20 //

21 //

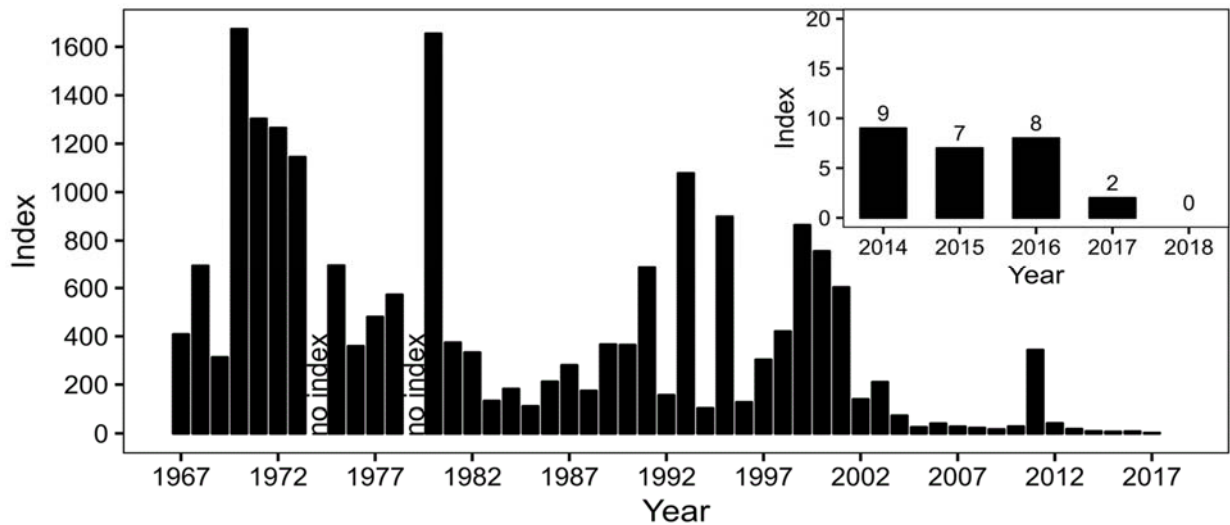
22 //

23 //

24 //

25 _____
 26 ² The U.S. Fish and Wildlife Service has determined that listing of the Bay-Delta distinct
 27 population segment of longfin smelt under the ESA is warranted but precluded by higher priority
 28 actions. 12-Month Finding on a Petition to List the San Francisco Bay-Delta Population of the
 Longfin Smelt as Endangered or Threatened, 77 Fed. Reg. 19,756 (Apr. 2, 2012); *see also*
 Review of Domestic and Foreign Species that are Candidates for Listing as Endangered or
 Threatened, 84 Fed. Reg. 54,733 (Oct. 10, 2019) (noting continued declines in longfin smelt).

Figure 1, Delta Smelt Fall Midwater Trawl Samples



Declaration of Bruce Herbold, Ph.D., in Support of Plaintiffs' Motion for Preliminary Injunction (Herbold Decl.) ¶ 21 (Fig.2); RJN Ex. 20.

In the 1960s, monthly fall sampling of Delta smelt regularly produced an index of more than 1,000 fish, in several years as many as 1,600, and never less than 200 when a sample was drawn. Herbold Decl. ¶ 21 (Fig.2). But the numbers have dropped precipitously to the single digits in recent years and to zero in 2018—a reduction of more than 99.9%. *Id.* Even the enhanced Delta Smelt monitoring program, which began in 2016 and involves more intensive weekly sampling year-round, recovered only 13 smelt in September and October of last year. *Id.* ¶ 22.

Other protected species have also experienced sharp declines. For example, in the 1960s longfin smelt sampling often found as many as 80,000 fish, but last year's sampling found only 52, and in 2015 and 2016 the numbers were in the single digits. *Id.* ¶ 32. The winter-run Chinook salmon population has declined from more than 100,000 adults in the 1960s to only 8,000 today, *id.* ¶¶ 35–39 (Fig. 6), and the spring-run salmon and steelhead trout populations have declined as well. RJN Ex 1 at 81, 91–95 (spring-run salmon); Herbold Decl. ¶¶ 42–44 (steelhead trout). Moreover, during the 2014–2016 drought, winter-run salmon experienced very high

1 mortality levels in 2014, and in 2015 mortality reached more than 95 percent of the eggs and
 2 emerging fry. *Id.* ¶ 14.

3 Reclamation’s pumps contributed to this decline by directly killing individual fish and by
 4 “entrainment”—the incidental capture and misdirection of fish by diverting water—of others,
 5 which either kills them or causes them to fail to migrate successfully. *Id.* ¶ 12.

6 **III. APPLICABLE STATUTES**

7 **A. The Endangered Species Act**

8 The ESA prohibits any “person” from “tak[ing]” any endangered fish or wildlife species
 9 without authorization. 16 U.S.C. §§1532(13), 1538(a)(1)(B). The ESA defines “take” broadly to
 10 include not only killing but also, among other things, significantly disrupting normal behavior
 11 patterns or significantly modifying or degrading habitat. *See* 16 U.S.C. § 1532(19); 50 C.F.R. §
 12 17.3. Section 7 of the ESA requires all federal agencies to ensure that any actions they authorize,
 13 fund, or carry out are “not likely to jeopardize the continued existence of any endangered species
 14 or threatened species or result in the destruction or adverse modification of” their designated
 15 critical habitat. *Id.* § 1536(a)(2); *see also* 50 C.F.R. § 402.2; Interagency Cooperation—
 16 Endangered Species Act of 1973, 81 Fed. Reg. 7,214 (Feb. 11, 2016).³

17 Any federal agency proposing an action that may affect a listed species must consult with
 18 either the National Marine Fisheries Service (NMFS) or U.S. Fish and Wildlife Service
 19 (USFWS), depending on the species involved. *Turtle Island Restoration Network v. U.S. Dep’t of*
 20 *Commerce*, 878 F.3d 725, 730 (9th Cir. 2017). The relevant Service then reviews the proposed
 21 action and prepares a biological opinion evaluating whether and how the action will impact the
 22 species. *Id.* (citing 16 U.S.C. § 1536(b); 50 C.F.R. § 402.12). If the opinion finds that the
 23 proposed action would jeopardize the listed species’ continued existence or result in adverse
 24 habitat modification, the opinion must include additional protective measures called “reasonable

25 _____
 26 ³ On August 27, 2019, the Services published a final rule (84 Fed. Reg. 44,976) to revise
 27 portions of the regulations that implement Section 7 of the ESA. The rule became effective on
 28 October 28, 2019, a week after the 2019 Biological Opinions were issued on October 21, 2019.
See 84 Fed. Reg. 50,333 (Sept. 25, 2019). The relevant version of the regulations is the version
 that was in effect when the opinions were issued. *See, e.g., Cajun Tubing Testors, Inc. v.*
Hargrave, 951 F.2d 72, 74 n.1 (5th Cir. 1992).

and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A). If the opinion finds no jeopardy, the Service can issue a statement permitting the incidental “take” of a certain number of the protected species. *Id.* § 1536(b)(4). The statement must specify the impact of the take on the species and include protective measures to minimize those impacts. *Id.* § 1536(b)(4)(C).

B. The California Endangered Species Act

Like the federal ESA, CESA prohibits any person or public agency from “taking” a species listed as endangered or threatened under CESA, unless authorized by CDFW to do so. Cal. Fish & Game Code § 2080. Under CESA, to “take” means to “hunt, pursue, catch, capture, or kill, or to attempt to hunt, pursue, catch, capture, or kill.” *Id.* § 86. CVP operations take the Delta smelt, the winter-run and spring-run Chinook salmon, and the longfin smelt, all of which are listed as threatened or endangered under CESA.

CDFW may authorize the take of CESA-listed species in several specific ways set out by statute, including: (1) issuing an incidental take permit in response to an application, provided that, among other things, the impacts of the authorized take are “minimized and fully mitigated,” and CDFW determines that the permit would not “jeopardize the continued existence of the species,” Cal. Fish & Game Code § 2081(b), (c); or (2) when the species at issue is protected under both CESA and ESA, a person holding a federal take authorization may request that CDFW determine whether the federal authorization is consistent with CESA and, if CDFW’s Director determines it is, no further take authorization is needed. *Id.* § 2080.1.

C. The National Environmental Policy Act

NEPA requires the preparation of a detailed environmental impact statement (EIS) for any “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). In preparing an EIS, a federal agency must consider all of the direct, indirect, and cumulative impacts of the proposed actions. 40 C.F.R. §§ 1508.7, 1508.8(a), (b); *see Diné Citizens Against Ruining Our Env’t v. Bernhardt*, 923 F.3d 831, 851 (10th Cir. 2019).

IV. THE BIOLOGICAL OPINIONS AND RECLAMATION’S PROPOSED ACTION

Because CVP and SWP operations may cause “take” of endangered and threatened species and adversely affect their designated critical habitat, as noted above, ESA requires the projects to

1 operate in compliance with biological opinions issued by the Services. In 2008 and 2009, the
2 Services issued biological opinions (the 2008/2009 BiOps) finding that project operations would
3 cause jeopardy to the listed species and limiting those operations accordingly. The 2008/2009
4 BiOps were subject to legal challenges but were ultimately upheld by the Ninth Circuit. *San Luis*
5 *& Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 597 (9th Cir. 2014); *San Luis & Delta-*
6 *Mendota Water Auth. v. Locke*, 776 F.3d 971, 988–89 (9th Cir. 2014).

7 In 2016, as a result of new information about the declining status of listed species, the
8 effects of recent drought years, and the evolution of best available science, Reclamation and
9 DWR requested reinitiation of Section 7 consultation with the Services regarding their
10 coordinated operations. RJN Ex. 1 at 2. On January 31, 2019, Reclamation issued a Biological
11 Assessment that included a description of proposed project operations (Proposed Action) to be
12 evaluated by the Services, as required by the ESA. 16 U.S.C. § 1536(c); *Id.* at 12–13.

13 On June 6, 2019, USFWS issued a draft biological opinion analyzing the Proposed Action’s
14 effect on Delta smelt. On July 1, 2019, NMFS issued another draft opinion analyzing the
15 Proposed Action’s effect on salmonid species, which include the Central Valley steelhead as well
16 as the winter-run and spring-run Chinook salmon. In its draft opinion, NMFS found that the
17 Proposed Action would jeopardize the survival of several species and adversely affect their
18 critical habitat. RJN Ex. 3.

19 On October 17, 2019, Reclamation issued its final Biological Assessment. RJN Ex. 1 at
20 13–14. Four days later, on October 21, 2019, the Services issued final 2019 Biological Opinions,
21 this time—contrary to both their 2008/2009 BiOps and NMFS’ 2019 draft biological opinion—
22 finding that the Proposed Action would not jeopardize the listed species or their critical habitat.
23 RJN Ex. 2 at 220; Ex. 1 at 797. Having found no jeopardy, the Services imposed no protective
24 limitations on the Proposed Action and allowed the Proposed Action to proceed as described in
25 Reclamation’s final Biological Assessment. RJN Ex. 2 at 393; Ex. 1 at 814.

26 Overlapping with this process, Reclamation conducted a NEPA review. In July 2019,
27 Reclamation made available for public comment its Draft Environmental Impact Statement for
28 the Reinitiation on Consultation of the Coordinated Long-Term Operation of the Central Valley

1 Project and State Water Project (Draft EIS). The Draft EIS designated, as Reclamation’s
 2 preferred alternative, the Proposed Action described in the January 2019 Biological Assessment.
 3 RJN Ex. 4 at 1-12; *see also* RJN Ex. 5. And on December 19, 2019, Reclamation issued its Final
 4 Environmental Impact Statement (Final EIS), which designated as the preferred alternative the
 5 Proposed Action described in Reclamation’s final October 2019 Biological Assessment,
 6 substantially altered from the version of the Proposed Action analyzed by the Draft EIS. RJN Ex.
 7 6 at 1-13, Appx. AB.

8 Finally, on February 19, 2020, Reclamation issued its Record of Decision on the
 9 Coordinated Long-Term Operation of the Central Valley Project and State Water Project (Record
 10 of Decision), thereby approving the Proposed Action. RJN Ex. 7 at p. 4.

11 **ARGUMENT**

12 “The purpose of a preliminary injunction is merely to preserve the relative position of the
 13 parties until a trial on the merits can be held.” *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395
 14 (1981). To obtain a preliminary injunction, a plaintiff must establish: (1) that it is likely to
 15 succeed on the merits; (2) that it is likely to suffer irreparable harm in the absence of preliminary
 16 injunctive relief; (3) that the balance of equities tips in the plaintiff’s favor; and (4) that the
 17 injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).
 18 Each of these requirements is satisfied here.

19 **I. CALIFORNIA IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS**

20 **A. Reclamation’s Operation of the Central Valley Project Is Arbitrary and** 21 **Capricious under the APA Because It Violates ESA**

22 Under the Administrative Procedure Act (APA), 5 U.S.C. §§ 702–706, a “reviewing court
 23 shall . . . hold unlawful and set aside agency action” where that action is “arbitrary, capricious, an
 24 abuse of discretion, or otherwise not in accordance with law” or “without observance of
 25 procedure required by law.” 5 U.S.C. § 706; *see also id.* § 702 (waiving sovereign immunity and
 26 creating a private right of action for violations of the APA). The 2019 Biological Opinions
 27 should be held unlawful because they are arbitrary, capricious, and contrary to the ESA. The
 28 Record of Decision, which is based on these defective opinions, is likewise unlawful because

Reclamation failed to fulfill its independent duty under section 7(a)(2) of the ESA. As set forth in detail in California’s first amended complaint and 60-Day Notice Letter, because the 2019 Biological Opinions fail to include sufficiently detailed guardrails for federal operations or definite measures to enhance species’ health, they cannot support their conclusion that Reclamation’s Proposed Action will not jeopardize the endangered species at issue. Because Plaintiffs in *PCFFA v. Ross*, No. 1:20-cv-00431 (E.D. Cal.) already have discussed these issues in detail, to avoid overburdening the Court, California respectfully refers the Court to Plaintiffs’ briefing in that case. *See* Plaintiffs’ Motion for Preliminary Injunction, *PCFFA v. Ross*, No. 1:20-cv-00431 (E.D. Cal.), at 12–28; *see also* Herbold Decl. ¶¶ 49–69.)

B. Reclamation’s Operation of the Central Valley Project Is Arbitrary and Capricious under the APA Because It Violates CESA

Reclamation’s operations under the Record of Decision also violate CESA and should be enjoined because Reclamation has neither applied for nor obtained take coverage under CESA. Thus, Reclamation violates CESA with each individual CESA-listed fish its operations kill.

1. The California Endangered Species Act Applies to Reclamation

Although CESA is a state law, federal statutes require Reclamation to comply with state laws relating to water and with California law in particular.

In the Central Valley Project Improvement Act of 1992 (CVPIA), Congress specifically addressed the pumping operations at issue here. Following the policy of “purposeful and continued deference to state water law” that Congress has employed in reclaiming the arid lands of the western United States since the mid-nineteenth century, *California v. United States*, 438 U.S. 645, 653 (1978), the CVPIA expressly requires Reclamation to comply with applicable California law. It states that Reclamation “shall operate the Central Valley Project to meet all obligations under *State* and Federal law,” CVPIA § 3406(b), Pub. L. No. 102-575, 106 Stat. 4707, 4714 (1992) (emphasis added); *see also id.* §§ 3411(a), 3406(b)(1)(C) (requiring Reclamation to “cooperate with the State of California” and referencing “additional obligations of the Central Valley Project which may be imposed by the State of California”).

1 The CVPIA’s recognition that Reclamation must follow California law in operating the
 2 Central Valley Project reflects the more general requirement in Reclamation’s enabling law, the
 3 Reclamation Act of 1902, that Reclamation “proceed in conformity” with state laws “relating to .
 4 . . water” used in irrigation:

5 Nothing in this Act shall be construed as affecting or intended to affect or to in any
 6 way interfere with the laws of any State or Territory relating to the control,
 7 appropriation, use, or distribution of water used in irrigation, or any vested right
 8 acquired thereunder, and the Secretary of the Interior, in carrying out the provisions
 9 of this Act, shall proceed in conformity with such laws

10 43 U.S.C. § 383. As this Court has recognized, this is language of “extraordinary breadth.” *Nat.*
 11 *Res. Def. Council v. Patterson*, 791 F. Supp. 1425, 1435 (E.D. Cal. 1992) (*Patterson I*). A state
 12 law “relat[es] to” a subject if it has “any connection with the subject” unless the state law’s
 13 relationship is ‘tenuous, remote or peripheral.’” *Id.* (quoting *Shaw v. Delta Air Lines, Inc.*, 463
 14 U.S. 95, 96–97 (1983)). Both this Court and the Ninth Circuit have held that the Reclamation Act
 15 mandates compliance with Section 5937 of the California Fish and Game Code, which requires
 16 dams to provide sufficient water flow to maintain fish below the dam in “good condition,” *see*
 17 Cal. Fish & Game Code § 5937, because that law “relates to the control, appropriation, use, or
 18 distribution of water used in irrigation.” *Patterson I*, 791 F. Supp. at 1435; *see also San Luis &*
 19 *Delta-Mendota Water Auth. v. Haugrud*, 848 F.3d 1216, 1234–35 (9th Cir. 2017) (applying
 20 Section 5937 to require Reclamation to protect fish living “many miles” below a dam); *Nat. Res.*
 21 *Def. Council v. Patterson*, 333 F. Supp. 2d 906, 917 (E.D. Cal. 2004) (*Patterson II*).

22 CESA also relates to the use and distribution of water under the broad language in Section 8
 23 of the Reclamation Act because, like Section 5937, it regulates the flow of waters needed by fish
 24 protected by the statute. Specifically, CESA bars diversions of water that adversely affect
 25 protected species, including negative flows created by the CVP’s powerful water pumps, which
 26 entrain and kill those protected species. *See Dep’t of Fish & Game v. Anderson-Cottonwood*
 27 *Irrig. Dist.*, 8 Cal. App. 4th 1554, 1562 (Cal. Ct. App. 1992). In this way, like its federal
 28 counterpart ESA, CESA regulates “the manner” in which water users exercise their water rights.
United States v. Glenn-Colusa Irrig. Dist., 788 F. Supp. 1126, 1134 (E.D. Cal. 1992). Thus, even
 though CESA does not expressly regulate water use, the relationship between CESA and the use

1 and distribution of water is not tenuous, remote, or peripheral. To the contrary, where, as here, it
 2 protects fish that need a flow of water to survive, CESA has a direct connection to the “use . . . or
 3 distribution of water used in irrigation,” 43 U.S.C. § 383, because it requires maintenance of the
 4 needed flow. Indeed, in cases such as this one, CESA regulates water use and distribution in the
 5 same manner as Section 5937 and, like Section 5937, triggers Section 8 of the Reclamation Act
 6 and therefore applies to Reclamation’s CVP operations.

7 Consistent with the foregoing, Congress in recent legislation recognized that the CVP must
 8 comply with state law and noted the potential applicability of CESA. *See* Water Infrastructure
 9 Improvements for the Nation Act (WIIN Act), Title III, Subtitle J, § 4002(a), Pub. L. No. 114-
 10 322, 130 Stat. 1628, 1855 (2016).⁴ This legislation prohibits increased pumping that “would be
 11 inconsistent with applicable State law requirements.” *Id.* § 4002(a). In addition, it states,
 12 “Nothing in the applicable provisions of this subtitle shall have any effect on the application of
 13 the California Endangered Species Act” *Id.* § 4005(b)(4).

14 Although in its Final EIS Reclamation denied any legal obligation under CESA, it has long
 15 committed itself to coordinate its operations with DWR to ensure compliance with CESA. All of
 16 the permits issued by the State Water Resources Board for the CVP warn Reclamation that it may
 17 be required to comply with CESA by stating that the permit “does not authorize any act which
 18 results in the taking of a threatened or endangered species or any act which is now prohibited, or
 19 becomes prohibited in the future, under . . . the *California Endangered Species Act.*” RJN Ex. 10
 20 at 148. Moreover, Reclamation repeatedly has pledged to ensure compliance with CESA. For
 21 example, an April 8, 2014, drought operations plan submitted by Reclamation promised to make
 22 modifications “based on evolving information, which could include . . . *California Endangered*
 23 *Species Act* requirements.” RJN Ex. 12 (emphasis added). Similarly, in the August 2, 2016,
 24 letter requesting reinitiation of consultation, Reclamation recognized the importance of ensuring
 25 “consistency with legal requirements for those listed species covered in the BiOp that are also

26 ⁴ Because the WIIN Act was enacted after *Patterson I* and *II*, it reflects a Congressional
 27 intention not to repudiate those cases. *United States v. Alvarez-Hernandez*, 478 F.3d 1060, 1065
 28 (9th Cir. 2007) (“Under the rules of statutory construction, we presume that Congress acts ‘with
 awareness of relevant judicial decisions,’” quoting *United States v. Male Juvenile*, 280 F.3d 1008,
 1016 (9th Cir.2002)).

1 listed under the *California Endangered Species Act*.” RJN Ex. 11 at 2 (emphasis added). And
 2 discussion drafts from the reinitiation of consultation process in May 2018 likewise stated that
 3 “[c]riteria have been proposed on how to implement the WIIN Act in accordance with the
 4 Endangered Species Act and *California Endangered Species Act*, as well as other regulations.”
 5 RJN Ex. 18 (emphasis added).

6 **2. Reclamation’s Operations Violate CESA**

7 Reclamation’s operations under the Proposed Action violate CESA. CESA states that no
 8 person or public agency shall kill, or “take,” species listed as endangered or threatened without
 9 authorization from the California Department of Fish and Wildlife (CDFW). Cal. Fish & Game
 10 Code § 2080. It is undisputed that Reclamation’s diversion of water as part of its CVP operations
 11 results in the take of Delta smelt, winter-run Chinook salmon, spring-run Chinook salmon, and
 12 longfin smelt, all of which are listed as threatened or endangered under CESA. *See* Cal. Code
 13 Regs. tit. 14, §§ 670.5(a)(2)(O), (M); (b)(2)(C), (E).

14 Reclamation’s Proposed Action will entrain both adult and larval Delta smelt (RJN Ex. 2 at
 15 151, 152; Ex. 6 at 5-71; Herbold Decl. ¶¶ 25–26, 54–56), as well as longfin smelt (Herbold Decl.
 16 ¶¶ 51–53). Reclamation’s pumping is especially dangerous for longfin and Delta smelt during the
 17 period from May 11 through May 31, 2020.⁵ These two CESA-listed species hatched their larvae
 18 in the Delta, and their young will be rearing there in May. Herbold Decl. ¶¶ 5, 30, 51–56.
 19 Increased pumping—as anticipated to occur after May 10, 2020—entrains more young of both
 20 smelt species. *Id.* ¶ 53, 56.

21 Indeed, such pumping will cause population-level impacts on longfin smelt. Reclamation
 22 has already taken longfin smelt in the hundreds per day as a result of increased pumping in April,
 23 and these fish appear to be almost entirely in the Delta now through May, so impacts in the Delta
 24 will affect the entire population of these fish at once. Herbold Decl. ¶¶ 33–34. Reclamation’s
 25 CESA violations are particularly egregious because by the time Reclamation ramped up its
 26

27 _____
 28 ⁵ Reclamation admits that its operations have “the potential to negatively affect the
 population abundance” of longfin smelt. RJN, Ex. 6 at 5-72.

1 pumping in early April, it was already taking larval longfin smelt in significant numbers. *Id.* ¶
 2 34.

3 Reclamation's operations will also entrain young Delta smelt that are expected to be in the
 4 South Delta in mid- to late May. *Id.* ¶¶ 56. Increased pumping over that allowed under the
 5 2008/2009 BiOps also shifts the location of Delta smelt habitat into sub-optimal locations where
 6 Delta smelt will be more vulnerable to predation and have reduced access to food, presenting
 7 significant concerns for the survival of the species in 2020. *Id.* ¶¶ 64–69.⁶

8 This take is unauthorized and illegal. Reclamation has neither requested nor received an
 9 incidental take permit for these species from CDFW. *See* Fish & Game Code § 2081(b), (c). Nor
 10 has Reclamation requested a CDFW determination that the federal protections for the Delta smelt
 11 are consistent with CESA. *Id.* § 2080.1. Accordingly, California is likely to prevail on the merits
 12 of its CESA claim against Reclamation.

13 **C. Reclamation's Final EIS Violates NEPA**

14 Reclamation also violated NEPA because (1) in the Final EIS it failed to take the required
 15 “hard look” at the Proposed Action's environmental consequences; and (2) it failed to supplement
 16 its Draft or Final EIS after making substantial changes to the Proposed Action and adding
 17 significant new information. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332,
 18 349–50 (1989).

19 **1. Reclamation Violated NEPA by Failing to Take a Hard Look at the** 20 **Environmental Consequences of its Actions**

21 To meet the “hard look” standard, NEPA requires federal agencies to disclose and
 22 rationally evaluate all of the direct, indirect, and cumulative impacts of their proposed actions.
 23 *Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 851, 853 (10th Cir. 2019).
 24 This analysis must be “full and fair,” *League of Wilderness Defs./Blue Mountains Biodiversity*
 25 *Project v. Connaughton*, 752 F.3d 755, 762–63 (9th Cir. 2014), and must contain a reasonably
 26 thorough discussion of the significant aspects of the probable environmental consequences, such

27 ⁶ Reclamation's operations have already caused and will cause increased entrainment and
 28 loss of both winter-run and spring-run Chinook salmon. RJN Ex. 1 at 753, 764; RJN Ex. 6 at 5-
 68, 5-69; Herbold Decl. ¶¶ 34, 38–41.

1 that the EIS fosters both informed decision-making and public participation. *See City of Carmel-*
2 *by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1150–51 (9th Cir. 1997). Reclamation's
3 Final EIS is arbitrary and capricious under the APA because it failed to adequately analyze the
4 environmental impacts to aquatic resources in three ways.

5 *First*, Reclamation's analysis of the environmental impacts of the project on Delta smelt is
6 tainted by the inclusion of speculative protective measures, which NEPA forbids. *N. Alaska*
7 *Env'tl. Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir. 2006); *see also Or. Nat. Res. Council*
8 *Fund v. Brong*, 492 F.3d 1120, 1134 (9th Cir. 2007) (“[G]eneral statements about possible effects
9 and some risk do not constitute a hard look absent a justification regarding why more definitive
10 information could not be provided.”). The Final EIS's assessment of the Proposed Action's
11 impacts on Delta smelt assumes that the fish will benefit, by 2030, from a conservation hatchery
12 that will breed and propagate smelt in sufficient quantities to augment the existing wild
13 population. *See* RJN Ex. 6 at O-313, O-374, Appx. AB at 4-80. As noted by commenters
14 including CDFW, however, the current refuge population requires the capture of approximately
15 100 wild Delta smelt per year to maintain necessary genetic diversity within the refuge
16 population. Given the scarcity of wild Delta smelt, this wild capture requirement is increasingly
17 unlikely to be met. By relying on a speculative hatchery reintroduction plan, Reclamation failed
18 to make a “full and fair” assessment of the consequences of its action on the species. *League of*
19 *Wilderness Defs.*, 752 F.3d at 762.

20 *Second*, Reclamation relied on unsupported assumptions and failed to adequately analyze
21 the impacts of storm-related flexibility during critical fish migratory months (RJN Ex. 6 at 3-11),
22 which was arbitrary and capricious and violated NEPA. *Great Basin Res. Watch v. Bureau of*
23 *Land Mgmt.*, 844 F.3d 1095, 1103 (9th Cir. 2016) (bare assertion of opinion, without explanation,
24 was insufficient for EIS). Reclamation proposes that, in the event of a precipitation event leading
25 to a higher level of flow available for diversion, the export facilities will pump water at a
26 combined rate of up to 14,900 cubic feet per second (cfs) for an unspecified amount of time. *See*
27 RJN Ex. 6 at 3-43. But young migrating salmonid species use elevated flows in the river basins
28 as a cue to begin migrating downstream. RJN Ex. 1 at 531. As a consequence, the “storm-related

1 flexibility” proposed by Reclamation allows it to ramp up pumping just as juvenile salmonids are
2 swimming through the zone of entrainment danger. *Id.*

3 Given that danger, to satisfy NEPA’s requirement that Reclamation take a “hard look” at
4 the Proposed Action’s environmental consequences, Reclamation was required to rigorously and
5 objectively analyze the environmental effects of its proposed storm-flex events. Reclamation did
6 not. In fact, it never modeled the flow effects of pumping anywhere near the 14,900 cfs
7 maximum that the Proposed Action contemplated. Reclamation also assumed that the pumping
8 rate would occur for only seven days in each of January and February during above normal and
9 below normal water years. *See* RJN Ex. 37 at Section F1.1.1.3.1. But Reclamation never
10 explained this assumption, which is contrary to the definition of storm-related flexibility in the
11 2019 Biological Opinions and allows increased pumping whenever “precipitation falls in the
12 Central Valley and Delta watersheds” and the project operators “determine that the Delta outflow
13 index indicates a higher level of flow available for diversion.” RJN Ex. 6 at 3-43. Indeed,
14 Reclamation did not modify the modeling even after receiving comments on the Draft EIS
15 identifying the arbitrary nature of its assumptions. *See* RJN Ex. 6 at 4-387.

16 *Third*, Reclamation failed to adequately discuss mitigation of the Proposed Action’s
17 impacts on longfin smelt. An “important ingredient of an EIS is the discussion of steps that can
18 be taken to mitigate adverse environmental consequences.” *Robertson*, 490 U.S. at 351; *see also*
19 42 U.S.C. § 4332(C)(ii); 40 C.F.R. §§ 1508.25(b), 1502.14(f), 1502.16(h), 1505.2(c). That
20 discussion must provide “an assessment of whether the proposed mitigation measures can be
21 effective,” and “whether anticipated environmental impacts can be avoided.” *S. Fork Band*
22 *Council of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 588 F.3d 718, 727 (9th Cir. 2009). It
23 must also include “sufficient detail to ensure that environmental consequences have been fairly
24 evaluated.” *Robertson*, 490 U.S. at 352. In its Final EIS, Reclamation’s discussion of efforts to
25 mitigate impacts to longfin smelt failed to satisfy these requirements.

26 The Final EIS concedes that “[r]eductions in winter/spring Delta outflow under Alternatives
27 1 through 3 have the potential to negatively affect the population abundance of Longfin Smelt,”
28 and that “[c]hanges in OMR management under Alternatives 1 through 3 could increase Longfin

Smelt south Delta entrainment risk.” RJN Ex. 6 at 5-72, O-313—O-319. But the Final EIS proposes only to monitor, and not mitigate for, longfin smelt losses. RJN Ex. 6 at 5-72, E-30, O-84—O-85, O-313—O-319, O-842—O-847. Monitoring, by itself, does not qualify as a mitigation measure. 40 C.F.R. § 1508.20. Under NEPA, a mitigation plan may rely on monitoring only when that monitoring is used to complement other mitigation measures and to help refine and improve the implementation of those measures as the project progresses. *Protect Our Communities Found. v. Jewell*, 825 F.3d 571, 582 (9th Cir. 2016). And even if Reclamation’s proposed monitoring did qualify as mitigation under NEPA, the Final EIS fails to provide the “essential” assessment of whether this measure could be effective at minimizing the Proposed Action’s potential impact on longfin smelt. *S. Fork Band Council*, 588 F.3d at 727. The Final EIS simply states: “Mitigation measure AQUA-16 will monitor the presence of Longfin Smelt under Alternatives 1 through 4.” RJN Ex. 6 at 5-72, O-313—O-314, O-476, O-595, O-738. Such “[p]erfunctory descriptions or mere lists of mitigation measures are insufficient.” *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1088 (9th Cir. 2013).

In response to CDFW comments proposing a substantive mitigation measure to protect longfin smelt, Reclamation asserted that “actions designed to benefit Delta smelt are anticipated to also benefit Longfin smelt.” RJN Ex. 6, Appx. AA at 4-3. But Reclamation did not explain that conclusion. Indeed, the Final EIS contradicts this assertion, stating: “Increased abundance of Delta Smelt from reintroduction of Delta Smelt under Alternative 1 potentially *could have negative effects on Longfin Smelt . . .*” RJN Ex. 6 at O-319 (emphasis added).

2. Reclamation Violated NEPA by Failing to Circulate a Supplement to the Draft or Final EIS

Not only did Reclamation fail to take the required hard look at the environmental consequences of its proposed action, it also failed to circulate a supplement as required by NEPA. NEPA requires that an agency “[s]hall prepare, circulate, and file a supplement” to a draft or final EIS if “(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R.

§ 1502.9(c); *see, e.g., Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 560-62 (9th Cir. 2006). Reclamation violated both requirements.

First, Reclamation violated NEPA by failing to circulate a supplement even after significantly changing the project and thereby “defeat[ed] NEPA’s goal of encouraging public participation in the development of information during the decision making process.” *Half Moon Bay Fishermans’ Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988); *see also* 40 C.F.R. § 1502.9(c)(1)(i); *California v. Block*, 690 F.2d 753, 770 (9th Cir. 1982) (requiring circulation of a supplement to the EIS because the agency had changed the proposed action in the final EIS).

While an agency “can modify a proposed action in light of public comments,” a supplement to the EIS is required if “the final action departs substantially from the alternatives described in the draft EIS.” *Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011). Supplementation is not required only if both of “two requirements are satisfied: (1) the new alternative is a ‘*minor variation* of one of the alternatives discussed in the draft EIS,’ and (2) the new alternative is ‘*qualitatively within the spectrum of alternatives* that were discussed in the draft EIS.’” *Id.* (emphasis in original). Reclamation’s changes did not even meet the first.

The final project is much more than a minor variation of its original proposal. Reclamation’s Final EIS provides a list of 23 changes made to the Proposed Action between the Draft and Final EIS. RJN Ex. 6 at 5-7; *compare* RJN Ex. 4 at 1-12 and RJN Ex. 5; *with* RJN Ex. 6 at 1-13; and RJN Ex. 4. The revised Alternative 1 “sensitivity analysis” in the Final EIS contains over 2,500 pages of new information not included in the Draft EIS, including updated modeling related to: (a) storage, (b) flow, (c) diversion, (d) temperature, (e) salinity, (f) X2, (g) winter-run Chinook egg mortality, (h) water supply, and (i) chloride. RJN Ex. 37. Reclamation also failed to adequately explain how the extensive additional modeling and information affected its environmental analysis and proposed mitigation measures.⁷ RJN Ex. 37, Section F1.1.2.14. This was inadequate. *League of Wilderness Defs.*, 752 F.3d at 761.

⁷ For example, a table with “CalSim II Modeling Assumptions Callouts” lists 11 substantive changes in the updated modeling of Alternative 1. RJN Ex. 37, Section F1.1.2. There is no explanation for why there are only 11 changes to the modeling assumptions when the Final EIS lists 23 changes to Alternative 1. RJN Ex. 6 at 5-7.

1 To demonstrate that NEPA required Reclamation to supplement its Draft or Final EIS,
 2 California “‘need not show that significant effects *will in fact occur*’” as a result of Reclamation’s
 3 changes to the Proposed Action, *Klamath Siskiyou*, 468 F.3d at 562 (emphasis in original), but
 4 only that Reclamation’s failure to supplement its Draft or Final EIS to analyze the changes
 5 undermined “public participation in the evaluation of the environmental consequences.” *Block*,
 6 690 F.2d at 771. Here, it did, and Reclamation violated NEPA by failing to circulate a
 7 supplement for public comment. *See New Mexico v. Bureau of Land Mgmt.*, 565 F.3d at 707
 8 (requiring supplementation where agency changed an alternative to impose a quantitative
 9 restriction instead of a proximity restriction on surface disturbances in undisturbed grasslands).

10 *Second*, Reclamation’s inclusion of extensive additional modeling, without supplementing
 11 its Draft EIS, also violated NEPA because it was “significant new . . . information.” 40 C.F.R.
 12 § 1502.9(c)(1)(ii); *Roosevelt Campobello Int’l Park Comm’n v. U.S. E.P.A.*, 684 F.2d 1041, 1055
 13 (1st Cir. 1982) (requiring supplementation because “real time simulation studies” needed to be
 14 “conducted, circulated, and discussed”).

15 Reclamation provided the modeling information for the Fall X2 action for Delta smelt for
 16 the first time in an appendix to the Final EIS.⁸ RJN Ex. 6, Section F1.1.1 (Revisions to Model
 17 Assumptions), Section F1.1.2 at 11, 2-17, and Section F1.2.7 (X2 Position Results). This
 18 additional modeling of the Fall X2 action amounts to “significant new . . . information relevant to
 19 environmental concerns” that requires supplementation, because the Fall X2 action plays an
 20 important role in creating optimal habitat for Delta smelt. *See* 40 C.F.R. § 1502.9(c)(1)(ii); RJN
 21 Ex. 9 at 149-150). Indeed, relying on this new modeling, Reclamation’s Final EIS admits that the
 22 Proposed Action “would be expected to appreciably reduce the size of the low salinity zone in
 23 September-November of wet years compared to the No Action Alternative.” RJN Ex. 37, Section
 24 F1.1.2.14.4. Because this new modeling information “raises substantial questions” regarding the
 25 project’s impacts on Delta Smelt, further analysis is required “before allowing the project to
 26 proceed.” *League of Wilderness Defs.*, 752 F.3d at 760; *Klamath Siskiyou*, 468 F.3d at 562.

27 ⁸ “X2 refers to the horizontal distance from the Golden Gate Bridge up the axis of the Delta
 28 estuary to where tidally averaged near bottom salinity concentration of 2 parts of salt in 1,000
 parts of water occurs.” RJN Ex. 6 at 2-1.

Thus, California is likely to succeed on its NEPA as well as its ESA and CESA claims.

II. CALIFORNIA WILL SUFFER IRREPARABLE HARM FROM RECLAMATION'S OPERATIONS

Reclamation's operations under the Record of Decision will cause irreparable harm to endangered and threatened fish species that California holds in trust for the people of the state. Cal. Fish & Game Code § 711.7; *People v. Truckee Lumber Co.*, 116 Cal. 397, 399 (1897); *Betchart v. Dep't of Fish & Game*, 158 Cal. App. 3d 1104, 1106-07 (Cal. Ct. App. 1984). Listed species are an especially closely protected environmental resource. "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities" *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). The ESA requires more than the bare minimum of ensuring species' survival; the ESA places equal importance on species' ability to recover to a point where they no longer require protection. 50 C.F.R. § 402.02; *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Service*, 524 F.3d 917, 931-32 (9th Cir. 2008). Significantly reducing a species' chances of survival or recovery, or significantly reducing the value of its critical habitat, is sufficient to support a finding of irreparable harm. *Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 606 F. Supp. 2d 1195, 1207-10, 1249 (E.D. Cal. 2008).

The available and oft-cited data indicating the consistent and rapidly increasing mortality of these endangered and threatened fish species show that a significant increase in Reclamation's pumping under the 2019 Biological Opinions—especially from May 11 through May 31, 2020—will expedite the permanent loss of these species. Reclamation has already taken advantage of the Record of Decision's lifting of the 2009 NMFS BiOp's export restriction covering April and May, known as the Import:Export (I:E) Ratio (Reasonable and Prudent Alternative Action IV.2.1) to increase pumping between April 1 and April 7, 2020. Herbold Decl. ¶¶ 10, 16, 28, 53. Unless this Court enters the requested injunction, Reclamation's increased pumping from May 11 through May 31 will contribute to the demise of these species. This harm, detailed below, warrants imposition of an injunction because "[e]nvironmental injury, by its nature, can seldom

1 be adequately remedied by money damages and is often permanent or at least of long duration,
 2 *i.e.*, irreparable.” *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).⁹

3 A. Delta Smelt

4 Reclamation’s operations under the Record of Decision will kill Delta smelt in violation of
 5 the ESA and CESA. With their one-year lifespan, Delta smelt are acutely sensitive to any
 6 changes in their environment. Herbold Decl. ¶ 20. The status of the Delta smelt and their critical
 7 habitat is already poor. RJN Ex. 2 at 95. The predominant habitat for young and maturing Delta
 8 smelt is the Low Salinity Zone (LSZ). Herbold Decl. ¶ 65. The location of the LSZ is measured
 9 in terms of kilometers from the Golden Gate Bridge, and it shifts in response to project
 10 operations, among other things. *Id.* at ¶¶ 58–60. Delta smelt arrive in this habitat from April
 11 through early June, and occupy and mature in this habitat from April through November. *Id.* at ¶
 12 58. Defendants acknowledge “pronounced” seasonal contraction of the low-salinity zone under
 13 the proposed action. RJN Ex. 2 at 96.

14 Most of the entire population of Delta smelt will be in this habitat in the last three weeks of
 15 May. Herbold Decl. ¶ 65. Any Delta smelt that do not reach this habitat by approximately mid-
 16 June generally do not survive. *Id.* When the LSZ is in Suisun Bay, smelt enjoy access to turbid
 17 but well-lit water that allows more successful feeding and higher survival. *Id.* When the LSZ is
 18 in the deeper river channels of the western Delta, access to food is impaired, and the clearer water
 19 increases predation on smelt. *Id.* The population of Delta smelt now “is thought to be so small
 20 that stochastic factors, such as a multi-year drought, the loss of key spawning or rearing sites, or
 21 an increase in local abundance of competitors or predators could cause extinction in the wild in
 22 the near future.” RJN Ex. 2 at 210. California is now entering a critically dry year that could
 23 become the first year of a multi-year drought, and Reclamation is proposing to diminish key
 24 rearing habitat for the Delta smelt.

25 The I:E requirements of the 2009 NMFS BiOp ensured a hydrodynamic connection of the
 26 waters from the San Joaquin River to San Francisco Bay, so those export restrictions usually

27 ⁹ Reclamation’s previous reassurances that it will not export water at levels materially
 28 exceeding those permitted under the 2008/2009 biological opinions have proven to be unreliable.
 See *PCFFA v. Ross*, No. 1:20-cv-00431 (E.D. Cal.), ECF No. 142 at 2-3.

1 resulted in higher levels of Delta outflow. Herbold Decl. ¶ 66. The higher outflows due to
 2 reduced exports in April moved the LSZ more consistently into the turbid waters of Suisun Bay.
 3 *Id.* Reclamation's increased export pumping from May 11-31, 2020, absent the I:E requirements,
 4 may push the LSZ's location from Suisun Bay to the deeper river channels of the western Delta
 5 and thereby reduce the survivability of Delta smelt. *Id.* ¶¶ 65–69.

6 Under the current, critically dry conditions, it is more likely than not that operations under
 7 the 2019 Biological Opinions will have a substantial impact on Delta smelt habitat, as well as on
 8 the movement and survival of whatever Delta smelt are still in the South Delta. Accordingly,
 9 Reclamation's operations from May 11 through May 31, 2020, will have a negative impact on the
 10 smelt's transport downstream to their rearing habitat, and on the location and quality of that
 11 habitat. Although the exceptionally low abundance of the smelt population makes quantification
 12 of fish deaths difficult, the likely detriment to the Delta smelt's survival and recovery by
 13 Reclamation's proposed action cannot be understated. *Id.* ¶¶ 65–69.¹⁰

14 **B. Longfin Smelt**

15 Similarly, Reclamation's operations are imperiling longfin smelt. Because this is a dry
 16 year, the longfin smelt population is largely confined to the Delta, with small numbers of adults
 17 generating a concomitantly small population of larvae. Herbold Decl. ¶ 33. Reclamation already
 18 started salvaging longfin smelt toward the end of March, with the salvage numbers increasing
 19 above 100 a day beginning on April 11. *Id.* ¶ 34. Historically, April and May were the months of
 20 greatest entrainment of longfin and Delta smelt larvae. *Id.* ¶ 53. The resumption of higher export
 21 rates allowed under the 2019 Biological Opinions after May 11 will likely lead to a similar take of
 22 longfin smelt larvae that have hatched in the interim, further imperiling larval smelt survival. *Id.*
 23 ¶ 53.

24 _____
 25 ¹⁰ The Proposed Action relies on loss thresholds for steelhead to trigger protective actions
 26 that would reduce exports if certain numbers of Delta smelt are salvaged at the pumps. RJN Ex. 2
 27 at 150. Because Delta smelt are so close to extinction, their appearance—or lack of appearance—
 28 in salvage is not a reliable indicator of their presence or loss, and the Biological Opinions do not
 include specific protections for them. Herbold Decl. ¶¶ 12–13, 26–27. Therefore, loss thresholds
 effectively have replaced historic protections with high reverse flows. *Id.* ¶¶ 52, 56, 63. Loss
 limits are similarly not protective of steelhead trout, because they are based on take numbers from
 a time when the species was much more abundant. *Id.* ¶ 62.

1 **C. Central Valley Steelhead**

2 Finally, if not enjoined, Reclamation’s operations will, from May 11 through May 31, 2020,
3 kill a substantial portion of a unique population of threatened steelhead trout, which is important
4 to the recovery of the species. Such losses, like the logging of old-growth trees, “cannot be
5 remedied easily if at all,” and so are irreparable. *League of Wilderness Defs.*, 752 F.3d at 764.

6 Reclamation’s operations include measures that will increase water exports from the Delta,
7 increasing the entrainment and hindering the recovery of steelhead trout. Reclamation’s
8 operation of the CVP’s export pumps changes the flows of the Old and Middle Rivers in the
9 vicinity of the pumps, which results in entrainment of the fish. Specifically, increased export
10 pumping results in more “negative” flows, meaning water flowing upstream toward the pumps.
11 *Id.* ¶¶15, 16. The more strongly negative the flows, the greater the likelihood and magnitude of
12 entrainment. *Id.* ¶¶ 49, 52–53. Specifically, loss of steelhead in May under the Proposed Action
13 is 232% of the loss under the previous Biological Opinion for that month. *Id.* ¶ 55. This is a
14 dramatic increase in loss by any measure. Importantly, during this time, more than a third of the
15 San Joaquin steelhead, a genetically unique population, will be migrating through the area
16 affected by Reclamation’s exports. *Id.*

17 The 2014 NMFS Recovery Plan set a recovery goal of 51% survival of San Joaquin
18 steelhead through the Delta, meaning at least 51% of the San Joaquin steelhead that enter the
19 Delta successfully migrate through. Herbold Decl. ¶¶ 57, 61. The current survival rate of the San
20 Joaquin Steelhead is nowhere near 51%. *Id.* Reclamation’s likely increase in pumping well
21 beyond levels that would have been allowed under the previous biological opinions, resulting in
22 the predicted increase in steelhead loss of 232%, will disproportionately affect San Joaquin
23 steelhead. *Id.* ¶¶ 61–62. This will undermine recovery of the overall Central Valley steelhead
24 species. *Id.*

25 **D. NEPA**

26 In addition to suffering irreparable injury to endangered species, California will also suffer
27 separate irreparable injury from Reclamation’s NEPA violations. “In the NEPA context,
28 irreparable injury flows from the failure to evaluate the environmental impact of a major federal

action.” *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004). As discussed in Section I.C. above, Reclamation failed to take the required hard look at the adverse effects of the Proposed Action, and further failed to supplement its Draft or Final EIS. These failures deprived the public of a meaningful opportunity to evaluate and comment on the Proposed Action, in violation of NEPA, and deprived Reclamation of an opportunity to make environmentally protective revisions to the Proposed Action in response to such comments. An injunction is needed to maintain the status quo while Reclamation completes a supplemental environmental impact analysis. *See, e.g., League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 767 (9th Cir. 2014); *Los Padres Forestwatch v. U.S. Forest Serv.*, 776 F. Supp. 2d 1042, 1053 (N.D. Cal. 2011); *Se. Alaska Conservation Council v. U.S. Forest Serv.*, 412 F. Supp. 3d 973, 983–84 (D. Alaska 2019).

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST SUPPORT ISSUING THE PRELIMINARY INJUNCTION

The balance of equities and the public interest also support the issuance of a preliminary injunction. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A party seeking a preliminary injunction “must establish . . . that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Id.* “If environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment.” *High Sierra Hikers Ass’n*, 390 F.3d at 642 (injunction upheld in NEPA case where U.S. Forest Service failed to properly evaluate the environmental consequences of issuing and renewing special-use permits).¹¹ And where plaintiffs raise permanent environmental harms, the balance of equities tips toward the plaintiffs if the defendants and any intervenors merely “face temporary delay” in acquiring economic benefits. *League of Wilderness Defs.*, 752 F.3d at 765–66. That is the case here, and the public interest also strongly favors an injunction.

¹¹ *See also S. Fork Band Council*, 588 F.3d at 728 (“Congress’s determination in enacting NEPA was that the public interest requires careful consideration of environmental impacts before major federal projects may go forward. Suspending a project until that consideration has occurred thus comports with the public interest.”)

1 While Defendants and Defendant-intervenors may that claim reductions in exports will
 2 cause economic harms, the economic losses that Defendants or Defendant-intervenors may suffer
 3 as a result of a preliminary injunction do not outweigh the significant environmental harms that
 4 will occur absent an injunction. *See, e.g., Idaho Sporting Congress Inc. v. Alexander*, 222 F.3d
 5 562, 569 (9th Cir. 2000) (injunction proper where environmental harm was sufficiently likely,
 6 despite fact that it “could present financial hardship” to government agency). As explained
 7 above, species listed as endangered or threatened are likely facing significant losses. In contrast,
 8 at most, Defendants and Defendant-intervenors might face a “temporary delay . . . in receiving a
 9 part of the economic benefits of the project.” *League of Wilderness Defs.*, 752 F.3d at 766. A
 10 preliminary injunction here will not prevent or stop water exports. Rather, because California
 11 seeks to return Reclamation’s operations to the previously permitted levels described in the 2008
 12 and 2009 biological opinions, including and especially for the period from May 11 through May
 13 31, 2020, which poses a particularly immediate threat to those species, Herbold Decl. ¶¶ 47–62, it
 14 would maintain exports at the same levels the projects and water users have been operating at for
 15 over a decade. Whatever harm operating under the 2008/2009 Biological Opinions might cause
 16 to Defendants and Defendant-intervenors, that harm is outweighed by the likelihood of impairing
 17 the recovery of steelhead trout, increasing the already disturbing rates of entrainment of the
 18 longfin smelt, and bringing Delta smelt substantially closer to extinction.

19 In addition, it is in the public interest—indeed, critically so—to prevent species from
 20 becoming extinct. *See, e.g., Tennessee Valley Auth.*, 437 U.S. at 187 (“the value of endangered
 21 species” is “incalculable”). Defendant-intervenors may counter by raising the prospect of adverse
 22 economic impacts to communities they serve. But those temporary harms—if any—are
 23 outweighed by the likely irreparable injury to listed fish species and their habitat. *League of*
 24 *Wilderness Defs.*, 752 F.3d at 767. A preliminary injunction is proper, and necessary, to protect
 25 the public’s interest in those listed species.

26 CONCLUSION

27 For all of the foregoing reasons, California respectfully requests that this Court issue a
 28 preliminary injunction that maintains the status quo by restraining Reclamation from operating

1 the CVP pursuant to the Proposed Action, and requiring that, from May 11 to May 31, 2020,
2 Reclamation operate the CVP pursuant to the requirements of Reasonable and Prudent
3 Alternative Action IV.2.1 of the NMFS 2009 BiOp.

4 Dated: April 21, 2020

Respectfully Submitted,

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